No. 13945

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Application of
DONALD E. CHANDLER
For Writ of Habeas Corpus,

Appellant,

vs.

FRED T. WILKINSON, Warden, Federal Penitentiary, McNeil Island, Washington,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE OLIVER J. CARTER, *Judge*

BRIEF OF APPELLEE

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STATEMENT OF PLEADINGS AND FACTS

The outline of the Statement of Facts presented by appellant is substantially correct, and such difference as appears from the facts stated in the Order of Dismissal, entered June 5, 1953, is inconsequential and not material to the question involved.

Appellee, therefore, does not desire to controvert

any implication created by emphasis or otherwise because he believes the instruments referred to, being a part of the record, speak for themselves, and because the facts upon which appellant specifies error seem sufficiently clear.

QUESTION PRESENTED

Did the delivery from a State Penitentiary of a prisoner on a writ of habeas corpus ad prosequendum to the federal authorities for trial resulting in his conviction, following which he was duly returned to the state institution for completion of his state sentence, render the federal jurisdiction such over him that he would be entitled, after service of his state sentence, to maintain that his federal sentence had commenced to run at the time of imposition?

ARGUMENT AND AUTHORITIES

Appellant in his opening brief takes the position that he is not concerned with the spirit of comity that exists between the several jurisdictions, and that in the absence of the specification that his federal sentence was to be served consecutively to his state sentence, that his federal sentence began on the date of imposition. (Appellant's Brief — Pages 7-8.)

On page 7 of his brief, appellant reaches the conclusion that in order to avoid his federal sentence

commencing on date of imposition, it should have recited it was to commence at the expiration of any other term appellant then was serving.

Appellee submits that such reasoning might have some application provided the State had undertaken by proper contract with the federal authorities to perform duties assigned to federal institutions and authorities, or if the federal authorities had acquired exclusive jurisdiction over appellant. However, appellee is unaware of any delegation of authority with respect to such duties, and certainly federal jurisdiction was then limited.

In *Lunsford v. Hudspeth*, 126 F. (2d) 653, at page 655, it is stated:

> "Embedded in the question presented is an interplay between state and federal sovereignties in the exercise of the power of each to enforce and vindicate its laws. Out of the exercise of this power has evolved the now axiomatic rule of law that a sovereignty, or its courts, having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction and remedy is exhausted *and no other sovereignty, or its courts, has the right or power to interfere with such custody or possession.*" (Italics ours.)

After discussing the facts in the light of cases cited therein, the Court, in the Lunsford case, said:

> "We hold in these circumstances, that the custody and control of the United States Marshal of the United States court, over the petitioner was temporary and that the Marshal acted in accordance with the established rules of comity and in obedience to the writ of habeas corpus ad prosequendum, under which he acquired jurisdiction of the petitioner when he returned him to the Warden of the state penitentiary."

The court, in the Lunsford case, found other compelling reasons for its decision in the terms of the statute, presently Title 18, U. S. C., Section 3568, which provides:

> "The sentence of imprisonment of any person convicted of an offense in a Court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail *for service of* said sentence. (Italics ours.)
>
> "If any such person shall be committed to a jail or other place of detention to wait transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or place of detention.
>
> "No sentence shall prescribe any other method of computing the term."

Aside from his own argument appellant has cited no authority that would lend aid to his theory that his federal sentence began on the date of imposition. There is no showing whatever by the appellant that he was being held prior to February 10, 1953, by the

United States Marshal awaiting transportation to a federal institution of imprisonment. Certainly, the appellant has cited no legal authority to support his contention that his sentence began to run at any time prior to February 10, 1953, when, as he sets forth in his brief at page 3,

> " * * * at which time he was discharged from Folsom Prison and immediately upon discharge U. S. Marshals took appellant into custody and said U. S. Marshals thereafter transported and delivered appellant to the United States Penitentiary, McNeil Island, Washington, * * *."

In further support of appellee's position and upholding the judgment of the District Court, are the following cases:

Gunton v. Squier, C.A. Wash., 1950, 185 F. (2d) 470;

Hayden v. Warden, C.C.A. Wash., 1941, 124 F. (2d) 514;

Rohr v. Hudspeth, C.C.A. Kan. 1939, 105 F. (2d) 747;

Vanover v. Cox, C.C.A., Mo. 1943, 136 F. (2d) 442.

No time was fixed for the commencement of the sentences in any of the above cases, except *Hayden v. Warden*, supra, and in that case the contention was made that the time of commencement was thereby made indefinite, and the Court at page 515, recognized the statute itself as controlling notwithstanding the

designation it was to be served consecutively to the state sentence.

Harrell v. Shuttleworth, 101 F. Supp. 408 is far more illustrative of the principle that as to time of commencement of sentence the statute is controlling nothwithstanding the federal sentence may provide that such sentence is "to begin at the expiration of sentence defendant is now serving in the Florida State Prison."

See also

Ponzi v. Fessenden, 258 U.S. 254;
Howell v. Hiatt, 55 F. Supp. 142;
Stamphill v. U. S., 135 F. (2d) 177.

In *Zerbst v. McPike*, 97 F. (2d) 253, at page 254, the Court expressly recognized "no time being fixed for the commencement of the sentence," the federal sentence could begin to run only from the date on which appellant was received at the federal penitentiary. (Headnote 5.)

CONCLUSION

For the reasons hereinabove stated, it must be contended that the decision below should be affirmed.

Respectfully submitted,

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